APPENDIX A

IN THE SUPREME COURT OF MISSOURI

December 19, 1995

Mr. Leonard P. Cervantes
1007 Olive Street, 4th Floor
St. Louis, Missouri 63101

In re: Louise Bass, et al. vs. National Super Markets, Inc.
Supreme Court No. 77915

Dear Mr. Cervantes:

This is to advise that the Court this day entered the following order in the above-entitled cause:

"Appellants' motion for rehearing overruled."

White, J., not participating.

Yours very truly,

THOMAS F. SIMON

BY /S/ Christina S. Vinson
Christina S. Vinson
Deputy Clerk, Court en Banc

cc: Edward J. Deghroony
Ronald C. Willenbrock

APPENDIX B

IN THE SUPREME COURT OF MISSOURI

No. 77915
E.D. No. 65169

LOUISE BASS, Surviving Spouse of
KENNETH BASS, et al.,
Plaintiffs-Appellants

vs.

NATIONAL SUPER MARKETS, INC.,
Defendant-Respondent.

PLAINTIFFS-APPELLANTS' MOTION FOR REHEARING

COME NOW Plaintiffs-Appellants and hereby file their Motion for Rehearing pursuant to Missouri Rule of Civil Procedure 84.17 and hereby bring to the Court's attention material matters of fact or law misinterpreted or overlooked by this Court and thereby request that this Court rehear this case, and in support thereof, state as follows:

I. THE COURT OVERLOOKED OR MISINTERPRETED MATERIAL MATTERS OF LAW OR FACT, WHICH TAKEN IN THE LIGHT MOST FAVORABLE TO PLAINTIFFS-APPELLANTS, REQUIRE THE COURT TO RULE THAT DECEDENT KENNETH BASS WAS NOT PERFORMING WORK IN THE "USUAL COURSE OF BUSINESS" OF NATIONAL AND THEREFORE WAS NOT DEFENDANT-RESPONDENT'S STATUTORY EMPLOYEE, INCLUDING:

A. THAT ON THE NIGHT OF HIS

B. DEATH, DECEDENT, KENNETH BASS, WAS SCHEDULED TO DO STRIPPING WORK AT THE NATIONAL STORE AND NOT ROUTINE CLEANING AND THAT THE STRIPPING OF THE FLOORS AT THE NATIONAL STORE WAS NOT DONE ROUTINELY ON A REGULAR OR FREQUENT SCHEDULE, RATHER IT WAS DONE ON A "REQUEST BASIS" EVERY SIX TO NINE MONTHS.

This Court should grant Plaintiffs-Appellants Motion for Rehearing because the Court's opinion overlooks material matters of fact or law as stated in the accompanying suggestions and memorandum in support of this motion, which is incorporated herein by reference.

This Court in its opinion, announced the new Missouri test to be applied by a trial court when deciding the putative statutory employer's "usual business". *Bass et al., v. National Super Markets, Inc.*, Slip Op. 77915 (Decided November 21, 1995). According to the Court's holding, the putative employer's "usual business" is defined as those activities (1) that are routinely done (2) on a regular and frequent schedule (3) contemplated in the agreement between the independent contractor and the statutory employer to be repeated over a relatively short span of time (4) the performance of which would require the statutory employer to hire permanent employees absent the agreement. *Bass*, Slip Opinion at 9.

This Court stated that Defendant-Respondent National was required to clean and sweep the floors in order to satisfy the Department of Health's regulations. The Court, however, overlooked the fact that Decedent Bass was not cleaning or sweeping the floors as may have been required by the health code, but rather was stripping the floor in preparation for the application of a wax coating. The health code does not require that National apply a shiny coat to its floors. It only requires that the floors be kept clean and free of debris. Furthermore, the stripping procedure was not routinely done on a regular and frequent schedule.

The stripping of National's floor was infrequently done and not on a regular schedule. Under the Court's newly announced guidelines on the definition of "usual course of business" Kenneth Bass was not performing work within the usual course of National's business and, therefore, Kenneth Bass was not the statutory employee of Defendant-Respondent.

II. THIS COURT SHOULD GIVE ITS DECISION IN THE CASE AT BAR PROSPECTIVE-ONLY APPLICATION TO AVERT INJUSTICE OR HARDSHIP UNDER THIS COURT'S THREE-FACTOR TEST ANNOUNCED IN *SUMNERS V. SUMNERS* WHICH FOLLOWED THE UNITED STATES SUPREME COURT'S ANALYSIS IN *CHEVRON OIL CO. V. HUSON* BECAUSE:

A. THE DECISION HEREIN ESTABLISHED A NEW PRINCIPLE OF LAW BY OVERRULING CLEAR PAST PRECEDENT;

B. THE PURPOSE AND EFFECT OF THE NEWLY ANNOUNCED RULE WILL NOT BE SIGNIFICANTLY ENHANCED OR RETARDED BY RETROSPECTIVE OPERATION; AND

C. A BALANCING OF THE INTERESTS AND HARDSHIPS WHICH WOULD RESULT FROM THE IMPOSITION OF THE COURT'S NEW RULE WOULD RESULT IN SUBSTANTIAL HARDSHIP TO PLAINTIFFS-APPELLANTS.

The Court should give prospective-only effect to the decision herein under this Court's three-factor test announced in *Sumners v. Sumners* and the United States Supreme Court's constitutional analysis in *Chevron Oil Co. v. Huson*. This Court's decision in *Bass* established a new principle of law by overruling clear past precedent. The purpose and effect of the newly announced rule will not be significantly enhanced or retarded by retrospective operation. In balancing the interests and hardships which would result from the imposition of the Court's new rule, substantial hardship would result to those, such as Plaintiff's herein, who may have relied upon the older rulings.

III. THE COURT'S DECISION DEPRIVES PLAINTIFFS-APPELLANTS OF THEIR CONSTITUTIONAL RIGHT TO A JURY TRIAL IN VIOLATION THEIR PROCEDURAL DUE PROCESS AND SUBSTANTIVE DUE PROCESS AS GUARANTEED BY THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

The Court's opinion in *Bass* deprived Plaintiffs-Appellants of their Constitutional right to a jury trial. The Court's decision makes the determination of statutory employee a matter for the trial court and removes it from the hands of the jury. This deprivation violates Plaintiffs-Appellants' substantive and procedural due process as guaranteed by the Fourteenth Amendment of the United States Constitution.

IV. THE DESIGNATION OF A "STATUTORY EMPLOYEE" IS AN IMPROPER CLASSIFICATION

WHICH DENIES PLAINTIFFS-APPELLANTS EQUAL PROTECTION UNDER THE LAW AS GUARANTEED BY THE UNITED STATES CONSTITUTION.

The Court's designation of a "statutory employee" creates a classification of individual which exempts certain parties, including Defendant-Respondent, from tort liability and deprives Plaintiffs-Appellants of their right to pursue their cause of action against Defendant-Respondent in violation of the Equal Protection Clause of the United States Constitution.

WHEREFORE, for the reasons stated above and in the accompanying Suggestions and Memorandum in Support of Plaintiffs-Appellants' Motion For Rehearing, Plaintiffs-Appellants hereby request that this Court grant their Motion for Rehearing.

CERVANTES & ASSOCIATES

By /s/ Mario G. Silva
Leonard P. Cervantes, #25043
Mario G. Silva, #39134
1007 Olive, Fourth Floor
St. Louis, MO 63101
314-621-6558
Attorneys for Plaintiff(s)

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing was served upon Ms. Ann Marie Piana, National Supermarkets, Inc., P. O. Box 7123, St. Louis, MO 63177 via facsimile, and hand-delivered to Mr. Ron Willenbrock, Amelung, Wulff & Willenbrock, 17th Floor Executive Office Building, 515 Olive Street, St. Louis, Missouri 63101-1839 on December 6, 1995.

By /s/ Mario G. Silva

APPENDIX C

IN THE SUPREME COURT OF MISSOURI

No. 77915
E.D. No. 65169

LOUISE BASS, ET AL.,
Plaintiffs-Appellants

vs.

NATIONAL SUPER MARKETS, INC.,
Defendant-Respondent.

PLAINTIFFS' SUGGESTIONS AND MEMORANDUM IN SUPPORT OF THEIR MOTION FOR REHEARING

I. THE COURT OVERLOOKED OR MISINTERPRETED MATERIAL MATTERS OF LAW OR FACT, WHICH TAKEN IN THE LIGHT MOST FAVORABLE TO PLAINTIFFS-APPELLANTS, REQUIRE THE COURT TO RULE THAT DECEDENT KENNETH BASS WAS NOT PERFORMING WORK IN THE "USUAL COURSE OF BUSINESS" OF NATIONAL AND THEREFORE WAS NOT DEFENDANT-RESPONDENT'S STATUTORY EMPLOYEE, INCLUDING:

A. THAT ON THE NIGHT OF HIS DEATH, DECEDENT, KENNETH BASS, WAS SCHEDULED TO DO STRIPPING WORK AT THE NATIONAL STORE AND NOT ROUTINE CLEANING AND

B. THAT THE STRIPPING OF THE FLOORS AT THE NATIONAL STORE WAS NOT ROUTINELY DONE ON A REGULAR OR FREQUENT SCHEDULE, RATHER IT WAS DONE ON A "REQUEST BASIS" EVERY SIX TO NINE MONTHS.

This Court in its opinion, announced a new Missouri test to be applied when deciding the putative statutory employer's "usual business". *Bass et al., v. National Super Markets, Inc.*, Slip Op. 77915 (Decided November 21, 1995). According to the Court's holding, the putative employer's "usual business" is defined as those activities (1) that are routinely done (2) on a regular and frequent schedule (3) contemplated in the agreement between the independent contractor and the statutory employer to be repeated over a relatively short span of time (4) the performance of which would require the statutory employer to hire permanent employees absent the agreement. *Bass*, Slip Opinion at 9. In the case at bar, Kenneth Bass was not performing work routinely done on a regular and frequent schedule repeated over a relatively short span of time.

Arthur Seise, the president of Building Butlers, stated that stripping of the floors was done on a "request basis" every six to nine months. (DE T. 119, L. 5-10). Based upon Mr. Seise's testimony, stripping work was clearly not part of the agreement between BBI and National. Stripping was not routinely done on a regular and frequent schedule. Stripping work was not contemplated in the agreement between BBI and National to be repeated over a relatively short span of time. The performance of stripping work would not have required National to hire permanent employees absent the agreement.

Kenneth Bass was employed by BBI to perform specialized polishing, buffing and stripping services at the Natural Bridge store (DE. T.122, L.21-25; T.142, L.4-19). He had been working for BBI for approximately two weeks. He had been performing stripping services for BBI at the Jewish Community Center (RI. T.342, L.24-25; T.343 L.1-6). Bass had worked approximately three nights at National. (DE. T.141, L.12-16). He was transferred to the National store to help complete the stripping job there. (DE. T.141, L.21-25). National employees did not lay finish or wax the floors. (DE. T.138, L.15-20). National employees never stripped the floors. (DE. T.138, L.21-23). National conceded that it did not do stripping

work. (Summers Depo. T.102, L.9-20). Furthermore, according to Louise Bass, her husband informed her that he would be stripping the floor at the National store on the night of his death. (RI T. 343, L. 25; T. 344, L. 1-3).

This Court took judicial notice of the regulations of the Department of Health which requires that the "cleaning of floors, walls and ceilings shall be done as often as in necessary." 19 CSR 20-1.020(23) (1992). *Bass* at 10. The Court then concluded that the stripping process was part of the floor care mandated by the Department of Health thereby making the stripping process part of National's usual business.

This conclusion misinterprets the duties required of Kenneth Bass. National's store manager, Harold Meyer, testified that the propane buffer was used for a more specialized purpose than merely cleaning the floor. (RO. T. 387, L. 24 - T. 388, L. 6). The buffer was not really for cleaning; it was to make the floor look shiny. (RO. T.387, L.24-25; T.388, L.1-6).

Judge William H. Crandall in the Eastern District's opinion in this case, stated:

In addition, there was evidence that decedent was stripping the floor at the store on the night of his death. The process of stripping required special chemicals and utilized the machinery in a particular fashion. Stripping was done only periodically. Stripping was, therefore, a specialized job, not routinely performed by National's in-house employees.

Slip Opinion E.D. No. 65169 at P. 9.

The Department of Health merely requires the cleaning of floors. It does not require that the floors be stripped or kept in highly glossed and polished condition. The work performed by Kenneth Bass was not required by the Department of Health and therefore, the Court erroneously concluded that the done performed by Kenneth Bass was within National's usual course of

business.

When there is a question of fact, as there is in this case, the Missouri Supreme Court defined the appropriate standard of review of the statutory employee defense in *Walton v. United States Steel Corp.*, 362 SW2d 617, 621 (Mo. 1962) when it stated that a court should never withdraw a question from the jury, unless all reasonable men, in the honest exercise of a fair and impartial judgment, would draw the same conclusion from the facts that condition the issue.

This Court misinterpreted the facts of the case at bar. Under the Court's newly announced guidelines on the definition of "usual course of business" Kenneth Bass was not performing work within the usual course of National's business and, therefore, Kenneth Bass was not the statutory employee of Defendant-Respondent. There was a question of fact for the jury as to whether stripping was part of the usual business. This was not a question of law.

II. THIS COURT SHOULD GIVE ITS DECISION IN THE CASE AT BAR PROSPECTIVE-ONLY APPLICATION TO AVERT INJUSTICE OR HARDSHIP UNDER THIS COURT'S THREE-FACTOR TEST ANNOUNCED IN *SUMNERS V. SUMNERS* WHICH FOLLOWED THE UNITED STATES SUPREME COURT'S ANALYSIS IN *CHEVRON OIL CO. V. HUSON* BECAUSE:

A. THE DECISION HEREIN ESTABLISHED A NEW PRINCIPLE OF LAW BY OVERRULING CLEAR PAST PRECEDENT;

B. THE PURPOSE AND EFFECT OF THE NEWLY ANNOUNCED RULE WILL NOT BE SIGNIFICANTLY ENHANCED OR RETARDED BY RETROSPECTIVE OPERATION; AND

C. A BALANCING OF THE INTERESTS AND HARDSHIPS WHICH WOULD RESULT

FROM THE IMPOSITION OF THE COURT'S NEW RULE WOULD RESULT IN SUBSTANTIAL HARDSHIP TO PLAINTIFFS-APPELLANTS.

The United States Supreme Court in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92, S.Ct. 349 (1971) and the Missouri Supreme Court in *Sumners v. Sumners*, 701 S.W.2d 720, 723 (Mo. banc 1985) clarified the principle that a court may constitutionally issue prospective-only application of its decision in order to avert injustice or hardship. A decision may be given prospective-only application if the court's decision establishes a new principle of law by overruling clear past precedent and if the purpose and effect of the newly announced rule will not be significantly enhanced or retarded by retrospective operation. The court must also balance the interests and hardships of the parties who would be affected by the decision. *Sumners* at 724.

The first prong of the *Sumners* test is clearly established because the Court's decision overruled its decision of *Wooten Youthcraft Mfg. Co.* 312 S.W.2d 1 (Mo. 1958). *Wooten* involved a Plaintiff who was employed by a cleaning company that contracted to perform janitorial services on Defendant's premises after the store closed for business. The *Wooten* case, on facts quite similar to the facts of the instant case, held that a janitorial employee was not performing work within the usual course of the putative statutory employer. The janitorial work in *Wooten* was performed after hours because the janitorial services would have interfered with defendant's usual work of manufacturing women's clothing. The defendant alleged that the janitorial services provided by plaintiff were an essential part of its business because it could not conduct its manufacturing business unless the premises were kept clean. The Supreme Court in *Wooten* addressed defendant's contention by comparing the services provided by janitorial firms with those provided by lighting system firms. The court stated that defendant's business could not be conducted without light, yet the lighting systems employees would not be statutory employees.

The second prong of the test requires the Court to consider whether the newly announced rule will be enhanced or retarded by retrospective operation. Realistically, it is doubtful that there are any pending cases in which the employee will be benefited by the Court's ruling herein. This part of the three-part test announced in *Sumner* should not be determinative of the issue.

The balancing of the equities, as required by the third prong of the test clearly favors Plaintiffs-Appellants. *Huff v. Union Electric*, 598 S.W.2d 503 (Mo. App. 1980) properly states the reality that in modern society, the employee is the one who is likely to suffer hardship by the retroactive restriction of common law liability by extension of the statutory employment designation

The *Bass* Plaintiffs, and other similarly situated Plaintiffs, have relied on prior court rulings in the area of statutory employment. The *Bass* Plaintiffs received a substantial verdict against a wrongful death tortfeasor. Worker's compensation benefits were provided by Bass's actual employer, BBI. Accordingly, no benefit extends to the *Bass* Plaintiffs as a result of the Court's ruling herein. The only beneficiary is a wrongful death tortfeasor. On the other hand, considerable hardship is suffered by the *Bass* Plaintiffs not only by the denial of a substantial verdict, but also by the obligations of substantial litigation costs and expenses. As pointed out in *Huff*, the primary beneficiaries of the Court's new rule will be common law tortfeasors. The Court's decision should be applied only prospectively as set forth by the Supreme Court in *Sumners*.

CERVANTES & ASSOCIATES

By /s/ Mario G. Silva
Mario G. Silva, #13834
Leonard P. Cervantes, #25043
1007 Olive, Fourth Floor
St. Louis, MO 63101

314-621-6558
Attorneys for Plaintiff(s)

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing was served upon Ms. Ann Marie Piana, National Supermarkets, Inc., P. O. Box 7123, St. Louis, MO 63177 via facsimile, and hand-delivered to Mr. Ron Willenbrock, Amelung, Wulff & Willenbrock, 17th Floor Executive Office Building, 515 Olive Street, St. Louis, Missouri 63101-1839 on December 6, 1995.

By /s/ Mario G. Silva

APPENDIX D

SUPREME COURT OF MISSOURI
EN BANC

No. 77915

LOUISE BASS, ET AL.,
Plaintiffs-Appellants

vs.

NATIONAL SUPER MARKETS, INC.,
Defendant-Respondent.

Appeal from the Circuit Court
Of the City of St. Louis

Honorable Timothy J. Wilson, Judge

OPINION FILED: November 21, 1995

We granted transfer to reexamine the manner in which appellate courts of this state have made determinations of statutory employment under section 287.040, RSMo 1994. The specific issue in this case is whether the trial court properly concluded as a matter of law that section 287.040, RSMo 1994, rendered plaintiffs' decedent, who performed floor care duties as the employee of an independent contractor, a statutory employee under The Workers' Compensation Law (the "Act"). As more fully explained, we hold that the performance of routine, frequent, and regular contractual duties is within the usual business of the employer. and falls under the coverage of the Act.

Our jurisdiction is founded on article V, section 10 of the Missouri Constitution, The judgment of the trial court is affirmed.

I.

There is no dispute as to the facts in this case, only their meaning. We take the facts from the evidence the *Bass* plaintiffs offered.

In August, 1986, Building Butlers, Inc. ("BBI") orally contracted with National Supermarkets ('National") to furnish personnel and provide janitorial services at National's Natural Bridge store in St. Louis. Under the agreement, BBI personnel swept and dust mopped the floor, scraped up gum or labels stuck to the floor, scrubbed, spot mopped, and buffed the floor with a propane powered buffer every night after National closed the store. In addition to the nightly cleaning, BBI agreed to wax the floor periodically and to strip the floor and apply fresh wax at less frequent, but regular intervals.

BBI hired Kenneth Bass. On the night of September 4, 1987, BBI assigned Bass to perform the routine janitorial services required by the agreement with National at the Natural Bridge store. Between 10:00 and 11:00 p.m. that night, two men forced their way past a security guard and into National's store. During the course of the robbery, these men shot and killed several people, including Bass.

On May 4, 1988, Louise Bass, (decedent's wife, and Maurice and Christopher Bass, decedent's surviving children, filed a civil action for wrongful death against National averring that National negligently failed to provide adequate security to protect Bass. National filed a motion to dismiss for lack of subject matter jurisdiction on the grounds that decedent was its statutory employee. The trial court initially overruled the motion.

The case proceeded to trial. The jury returned a substantial verdict against National. National filed a motion for a judgment notwithstanding the verdict, renewing its argument that jurisdiction of the Bass' claim was trial court in the Labor and Industrial Relations Commission. he trial court reviewed the

evidence, concluded that it lacked subject matter jurisdiction to enter am a civil action for damages in wrongful death because Bass was a statutory employee of National subject to the compensation provided by the Act, sustained the motion and entered judgment accordingly (In appeal the Court Of Appeals, Eastern District, reversed and remanded with instructions to reinstate the verdict.

II.

A.

The common law provided an employer with several defenses to a civil claim for damages filed by an employee. Three of these, assumption of the risk, contributory negligence, and the and the employer's non-liability for acts of third parties, effectively barred the negligent employee from recovering damages in a common law action for work-related injuries in most cases. The common law permitted an injured employee to recover for work-related injuries only if he or she could prove that the accident resulted solely from the employer's negligence. See generally Arthur Larson 1, The Law of Workmen's Compensation, Section 4.30 (1952).

Responding to the common law's seeming inability to fashion a remedy to provide redress for workers injured in increasingly common industrial accidents, state legislatures adopted workers' compensation laws that imposed a statutory contractual provision on the employee-employer relationship. *Oren v. Swift & Co.*, 51 S.W.2d 59, 61 (Mo. banc 1932). The statutory contract provided a means of compensating the injured worker that, with exceptions, eliminated the common law's concerns with negligence and fault altogether, established levels of compensation and provided for administrative determinations of the nature and extent of injury, subject to judicial review.

In 1925, Missouri's legislature adopted its first workmen's compensation law, 1925 Mo. Laws 375, directing that

"[a]ll of the provisions of this act shall be liberally construed with a view to the public welfare." § 3374, RSMO 1929. Cf. § 287.800, RSMo 1994.

Appellate courts of this state have interpreted the legislature's admonition to construe the Act liberally to mean that "[t]he legislative design...was to ameliorate, in the interest of the workman and the public welfare, the losses sustained by himself and his dependents from accidental injuries received by him in the proper course of his work..." *Maltz v. Jackoway-Katz Cap Co.*, 82 S.W.2d 909, 912 (Mo. banc 1935). Further, liberal construction of the Act requires that "where a question of jurisdiction is in doubt, it should be held to be in favor of the [Labor and Industrial Relations] commission." *Ringeisen v. Insulation services, Inc.*, 539 S.W.2d 621, 626 (Mo. App. 1976).

This Court is aware that the adoption of comparative fault in *Gustafsen v. Benda*, 661 S.W.2d 119 15 (Mo. banc 1983), makes the policy rationale underlying the Act less compelling. The Court is further aware -- as this case illustrates -- that an injured worker often prefers that a jury decide liability and damage issues in a civil suit rather than submit to the statutorily imposed compensation limitations found in the Act. Nevertheless, the legislature has not altered the scope or applicability of the Act since Gustafsen, nor the requirement that courts liberally construe its provisions.

B.

The dispositive issue in this case is whether Kenneth Bass worked as a statutory employee of National under section 287.040.

Section 287.040.1 defines a statutory employee.

> Any person who has work done under contract on or about hit premises which is an operation of the usual

> business he there carries on shall be deemed an employer and shall be liable under this chapter to such contract, his subcontractors, and their employees, when injured or killed on or about the premises of the employer while doing work which is in the usual course of his business.

The General Assembly adopted section 287.040 to prevent employers from circumventing the requirements of the Act by hiring independent contractors to perform work the employer would otherwise perform. *Walton v. U.S. Steel Corp.*, 362 S.W.2d 617, 622 (Mo. banc 1962).

As the statute makes clear, statutory employment exists when three elements coexist: (1) the work is performed, pursuant to a contract; (2) the injury occurs on or about the premises of the alleged statutory employer; and (3) the work is in the usual course of business of the alleged statutory employer. *McGuire v. Tenneco, Inc.*, 756 S.W.2d 532, 534 (Mo. banc 1988).

The first two elements are not at issue in this case. The parties agree that National orally contracted with BBI for floor cleaning services and that Bass's death occurred on National's premises.

The third element - whether the floor cleaning services performed by BBI and Bass were within the usual course of National's business -- is the focus of the case. National contends that the care and maintenance of its floors is within the usual course of its business. The Bass plaintiffs urge that Kenneth Bass was not a statutory employee because National's usual business is to buy, sell, manufacture, process and otherwise deal in groceries, produce, meat and general merchandise. Further, they argue that BIB used specialized equipment and procedures to perform the contractual duties. Under the plaintiffs' reasoning, National is not in the floor-cleaning business said the work performed by BBI employees under BBI's contract with National lies outside National's usual business.

C.

Courts have wrestled with the meaning of the phrases "usual business" and "usual course of business' in section 287.040.1. Although the cases do not fall neatly into rigid categories, two basic, analytical constructs inform the courts' decisions. The first line of cases say that the usual business of a company encompasses all of those activities--that are essential and integral to the statutory employer's business. See, e.g., *Viselli v. Missouri Theatre Building Corp.*, 234 S.W.2d 563, 567 (Mo. banc 1930) (window washing is within the usual business of a company that rented property to commercial tenants because essential); *Wooten v. Youthcraft Manufacturing Co.*, 312 S.W.2d 1, 3 (Mo. banc 1938) (janitorial service at a clothing manufacturer formerly performed by employees not an essential part of manufacturer's trade or business when contracted to an independent contractor);[1] *March v. Bernardin*, 78 S.W.2d 706, 708 (Mo. App. 1934) (annual repair of boiler within usual business of coal mine because necessary to operation of business); *Kennedy v. J.D. Carson Co.* 149 S.W.2d 424, 428 (Mo. App. 1941) (repair of an elevator is essential and therefore within the usual business of a furniture company where exhibition, sales and delivery of furniture requires use of the elevator); *Heskett v. Central Missouri State University*, 743 S.W.2d 712, 713 (Mo. App. 1987) (preparation of food is integral part of university's activities); *Mooney v. Missouri Athletic Club*, 859 S.W.2d 7729 774 (Mo. App. 1993) (furnishing security is integral part of athletic club's operation); *Miller v. McDonnell Douglas Corp.*, 896 S.W.2d 734, 737 (Mo. App. 1995) (installation and maintenance of a telecommunications system is part of the usual

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[1] Professor Larson describes *Wooten* as "[a] really remarkable decision" that would seem "grotesquely illiberal" the holding had not emitted a damage suit to proceed. Wooten is wrongly decided precisely because it ignores the legislature's mandate that the Act be liberally construed to provide coverage under the Act. This is so without regard to whether an underlying damage suit holds out the hope of a recovery.

course of business of an airplane manufacturer because necessary to conduct business).

A second line of cases places greater focus on the routine and frequent nature of the independent contractor's activities to determine whether the work is within the usual business of the putative employer. *See, e.g., Anderson v. Benson Mfg. Co.*, 338 S.W.2d 812, 815 (Mo. 1960) (guard services performed regularly and continuously to protect classified material within usual business); *Shaver v. First Union Realty Management, Inc.*, 713 S.W.2d 297, 300 (Mo. banc 1986) (full-time maintenance of heating and air conditioning equipment within usual business of company engaged in managing real estate); *Musielak v. International Shoe Co.*, 387 S.W.2d 217 (Mo. App. 1965) (employee of an independent contractor supplying janitorial services to a shoe manufacturer not statutory employee when removing paint from a floor in preparation for remodeling because remodeling not usually and customarily done); *Rouge v. St. Charles Speedway*, 733 S.W.2d 854, 856 (Mo. App. 1987) (even though the employer used the public address system as an integral part of its business, episodic repair of that system was not sufficient to constitute a part of the operation of speedway"s usual business); *McGuire v. Tenneco, Inc.*, 756 S.W.2d 532, 535 (Mo. banc 1988) (sweeping a warehouse Boor is within the usual business of company that operates paper recycling plant because work is regularly performed); *Taylor v. Associated Electric Cooperative, Inc.*, 818 S.W.2d 669, 671 (Mo. App. 1991) (painting water storage tanks at a coal-fired electricity generating plant is not within the usual business of a rural electric cooperative since only occasionally necessary).

The difficulties that attend holdings relying on the essential/integral test are obvious from the uneven results reached in the cases. In order to maximize profits, businesses generally limit expenditures to those. goods and services that are necessary to ongoing or planned activities. Thus, any activity undertaken or service contracted for is arguably essential and integral to the usual business of the putative employer no matter how removed

from the work its employees regularly perform its day-to-day operation.

With notable exceptions, the cases employing the essential/ integral test are older than those that use a routine/frequent analysis. It appears that the older cases are written more broadly to accommodate the common law's contributory fault system that denied recovery to any employee whose negligence contributed to his or her injury. Absent workers' compensation coverage, the employee -- and ultimately society -- bore the entire economic burden of the injury. By extending the Act's coverage to essential or integral business purposes, courts permitted compensation where it would not otherwise have existed.

The routine/frequent test is more narrow. It also has the virtue of more closely accommodating the legislature's intent in adopting section 287.040.1 -- to prevent, employers from avoiding their duties under the Act by contracting out work that their employees would normally do. And it does so without sweeping within its reach specialized or episodic work that is essential to the employer but not within the employer's usual business as performed by its employees.

Against this precedent and understanding of the legislature's purpose, we define a putative employer's "usual business" as used in section 287.040 as those activities (1) that are routinely done (2) on a regular and frequent schedule (3) contemplated in the agreement between the independent contractor and the statutory employer to be repeated over a relatively short span of time (4) the performance of which would require the statutory employer to hire permanent employees absent the agreement.

D.

When an action for damages arising from employment is filed in the circuit court, the court must decide initially whether it

or the Labor and Industrial Relations Commission has jurisdiction to address the issues raised. In determining the existence of statutory employment that would place the matter properly before the Commission, courts must consider the agreement between the putative employer and the independent contractor as a whole. The manner in which the independent contractor performed its contractual obligations is not relevant to the section 287.040 inquiry. Where the facts are not in dispute as to the nature of the agreement and the work required by it, the existence or absence of statutory employment is a question of law for the courts to decide. Only where the parties disagree as to whether the work that caused the injury was work performed under and required by the contract between the putative statutory employer and the independent contractor will a factfinder be asked to render a factual decision. Finally, until directed by the legislature to embark on another course, courts must continue to give the Act a liberal reading, deciding dose cases in favor of workers' compensation coverage.

E.

In the case sub judice and based on the evidence the Bass plaintiffs submitted, Bass worked under an oral agreement between BBI and National for routine floor maintenance. The agreement required nightly cleaning as well as periodic stripping and waxing of National's floors. This work was routinely done on a regular and frequent schedule and repeated over a relatively short span of time. Absent its contract with BBI, National would have had either to assign floor care duties to its staff or to hire a staff specifically to maintain its floors. This is because - regulations of the Department of Health, of which we take judicial notice and under which National operates, require that the "[c]leaning of floors, walls and ceilings shall be done as often as necessary." 19 CSR 20-1.020(23) (1992). We conclude, therefore, that at the time of his death Bass was performing work within the usual course of National's business. The trial court properly found Bass a statutory employee of National as a matter of law.

Ill.

The judgment of the trial court is affirmed.

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EDWARD D. ROBERTSON, JR. Judge

Holstein, C.J., Benton, Price, Limbaugh,
Covington, JJ., and Edwards, Sr.J., concur.
White, ., not participating because not a
member of the Court when case was submitted.

APPENDIX E

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT
DIVISION THREE

No. 65169

LOUISE BASS, surviving spouse of KENNETH BASS,
and MAURICE BASS and CHRISTOPHER BASS,
Surviving Children of KENNETH BASS, Deceased

Plaintiffs/Respondents

v.

NATIONAL SUPER MARKETS, INC.

Defendant/Appellant.

Appeal from the Circuit Court
of the City of St. Louis

Honorable Timothy J. Wilson

OPINION FILED: March 7, 1995

Plaintiffs, Louise Bass, Maurice Bass, and Christopher Bass, brought an action against defendant, National Super Markets, Inc., for the wrongful death of Kenneth Bass. Plaintiffs appeal from the trial court's grant of defendant's motion for judgment notwithstanding the verdict, following a jury verdict in favor of plaintiffs in the amount of $3,000,000.00. The trial court entered judgment n.o.v. on the basis that Kenneth Bass was a statutory employee of National Super Markets, Inc. (National) at

the time of his death.[1] We reverse and remand.

In determining whether plaintiffs made a submissible case, the evidence is viewed the light most favorable to the plaintiffs, giving them the benefit of all reasonable inferences drawn from the evidence in support of their cause of action. *Bizzle v. Enterprise Leasing*, 741 S.W.2d 84, 85 (Mo-App. 1987). Sustaining a motion for judgment n.o.v. should be done only when all of the evidence and the reasonable inferences therefrom are so strongly against the plaintiffs' case that there is no room for reasonable minds to differ. Id.

The evidence, viewed in this light, established that on September 4, 1987, Kenneth Bass (decedent) was employed by Building Butlers, Inc. (BBI), a company which provided janitorial services to residential, commercial, and retail customers. He was working at a National super market located at 4331 Natural Bridge in St. Louis, Missouri (store), when he was killed during a robbery.

BBI contracted with National to provide floor cleaning services at the store. One BBI employee scrubbed and buffed the floor nightly, using a method known as the Pioneer Eclipse Program (PEP), a program which utilized specific products and steps. The nightly routine included sweeping the floor; dust mopping the floor, scraping up gum or labels stuck to the floor; scrubbing the floor with an automatic scrubber; spot mopping the floor; and finally using a propane-powered buffer to shine the floor.

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[1] In conjunction with the trial court's grant of defendant's motion for judgment n.o.v., the court dismissed plaintiffs' action without prejudice for lack of subject matter jurisdiction. See, e.g., *Mays v. Penzel Construction Company*, 838 S.W.2d. 1 (Mo. in App. E.D. 1992). Given that the trial court granted judgment n.o.v. on the ground that Kenneth Bass was defendant's statutory employee, the dismissal of plaintiffs' action necessarily followed. The salient issue, however, is the submissibility of plaintiffs' case. The parties on appeal have properly focused on the court's grant of judgment n.o.v., which we address in this opinion.

National supplied all of the mops and brooms, as well as the PEP cleaning products. BBI furnished the propane buffer, the buffer pad$, and the propane fuel for the buffer. BBI was responsible for maintaining the buffer. Although the buffer was kept at the store, it was used exclusively by BBI employees. The nightly process of cleaning the floor took about seven hours and was performed after closing hours when no customers were in the store. National did not want the buffers interfering with customers while they shopped.

In addition to the nightly floor cleaning, BBI employees waxed the floor, in some areas of the store every five to eight days and in other areas every other week. About every six to nine months, BBI employees stripped and waxed the floor. National employees did not strip, wax, or polish the floor.

BBI controlled its employees and determined which employees worked at the store. Although National informed BBI employees of specific areas of the store which required cleaning, it was within the exclusive province of BBI to hire its employees, to train them, and to fire them.

During the day; National employed about three porters to sweep the floor and mop up spills. National did not hire or train anyone to scrub and buff the floor, either during normal working hours or after the store closed. In addition to keeping the floor clean during the daytime hours of operation, the two day porters did general cleaning.

At the time of the incident, decedent had worked at the store for about three days. Prior to coming to the store, he had stripped floors for another BBI customer. Although he originally worked with the stripping crew at the store, on the night in question he was assigned to the job of scrubbing and buffing the floor.

Between 10:00 and 11:00 p.m. that night, two men forced their way past a security guard and into the store. During

the course of a robbery, they shot and killed several people, including decedent.

Louise Bass, decedent's surviving spouse, and Maurice Bass and Christopher Bass, decedent's surviving children, brought this wrongful death action against National. They alleged that National was negligent in failing to provide adequate security. National raised the affirmative defense of statutory employee as a bar to plaintiffs' common law negligence action. National argued that decedent's scrubbing, buffing, and stripping the floor constituted its usual and customary business, because it was required to keep the store clean.

After a trial, the jury returned a verdict in favor of plaintiffs in the amount of $3,000,000.00. The trial court later granted National's motion for judgment n.o.v. on the basis that decedent was a statutory employee.

On appeal, plaintiffs challenge the trial court's granting judgment n.o.v. in favor of National. The issue is whether the trial court erred in finding that decedent was National's statutory employee at the time of his death, thereby limiting his recovery to Workers' Compensation Law. Section 287.040-1., RSMO (1994) defines a statutory employee as follows:

> Any person who has work done under contract on or about his premises which is an operation of the usual business which he there carries on shall be deemed an employer and shall be liable under this chapter to such contractor, his subcontractors, and their employees, when injured or killed on or about the premises of the employer while doing work which is in the usual course of his business.

The statute establishes a constructive employment relationship. in order to extend workers' compensation coverage to employees of employers who have work done pursuant to a contract. *Tumbas v. J. L. Mason Group, Inc.*, 809 S.W.2d 188, 190 (Mo. App.

1991). Its purpose is to prevent an employer from evading workers' compensation liability by hiring independent contractors to perform the usual work his employees would otherwise perform. Id. To categorize an employee as a statutory employee, it is necessary that three elements-exist: (1) the work was performed pursuant to a contract; (2) the injury occurred on or about the premises of the statutory employer; and (3) the work was in the usual course of business of the statutory employer. Id. When attempting to determine the application of § 287.040.1, each case must be determined on its own facts and the court must recognize the real roles and relationships of the parties as they relate to the purpose of the statute. Id.

The first two elements required to establish that decedent was a statutory employee of National are not at issue in the present case. National owned the premises on which decedent was killed; and decedent's employer, BBI, contracted with National to provide floor cleaning service at the store. The salient issue focuses on the third requirement; namely, whether the floor service performed by decedent was in the usual course of National's business.

National claims that at the time of his death decedent was performing tasks which were within the usual course of its business. It alleges that cleaning the floor was an integral. and essential part of the store's operation and relies on the following facts to buttress its position: both state and federal health regulations required it to keep the floor clean; its employees performed the same work during the day; it provided all the equipment and cleaning products for use in the store, except for the equipment used in conjunction with the PEP system; and a clean store was essential to remaining competitive with other grocery stores in the community.

In *McGuire v. Tenneco, Inc.*, 756 S.W.2d 532, 533 (Mo.banc 1988), McGuire was employed by a temporary employment agency. Tenneco, which operated a paper recycling plant, requested laborers from the agency "for the following day

in anticipation of a large volume of paper products and a need for additional "sorters.'" Id. When he reported for work, McGuire was assigned to sweep paper off the warehouse floor, a job which was usually a sorter's duty. Id. McGuire was sweeping the floor when he was injured. Id. The Supreme Court of Missouri held that McGuire was a statutory employee of Tenneco because "[s]weeping the warehouse floor constitutes work which is within the usual course of Tenneco's business Id. at 536.

In *Musielak v. International Shoe Co.*, 387 S.W.2d 217, 218 (Mo. App. 1965), Musielak worked for a janitorial service which contracted with International Shoe to provide general janitorial services. An International Shoe foreman directed Musielak to clean and mop the floor of the cafeteria with a solution furnished by International Shoe. *Id.* The purpose of the work. was to remove old spots of paint from the floor, in preparation for a new tile floor as part of a remodeling project. *Id.* at 219. Musielak suffered injury when his feet came in contact with the caustic cleaning solution. *Id.* In finding that Musielak was not a statutory employee, this court reasoned:

> There is no evidence that [International Shoe] usually or customarily used such a solution to clean its floors or that it usually or customarily did the work this floor cleaning was an integral part of; i. e., laying a new floor and remodeling the cafeteria...In the instant case the transcript ...shows this work to have been incidental, auxiliary and ancillary to [International Shoe's] usual business.

Id. at 222 (citations omitted).

In *Wooten v. Youthcraft Mfg. Co.*, 312 S.W.2d 1, 2 (Mo. 1958), Youthcraft contracted with a janitorial service to provide janitorial work for its clothing manufacturing business after working hours. Youthcraft had discontinued janitorial work during working hours, because it interfered with the work of its employees. *Id.* Wooten worked with a crew that cleaned

Youthcraft's premises as well as others'. *Id.* The Supreme Court held that Wooten was not a statutory employee of Youthcraft because the janitorial work he did was not an essential part of Youthcraft's business. *Id.* at 3. It pointed to the fact that "the janitorial work was done after closing time because if done during working hours, it interfered with the proper operation of [Youthcraft's] business." *Id.*

In reaching its holding, the *Wooten* court cited to *Viselli v. Missouri Theatre Bldg. Corp.*, 234 S.W.2d 563 (MO. 1950). In Viselli, the Supreme Court of Missouri held that Viselli, who was washing windows when he was injured, was a statutory employee of the owner of a commercial building because window washing was essential to maintaining the building in good condition. *Id.* at 567. The court pointed out that cleaning windows was part of the building owner's business, because the owner provided it to its tenants as a service along with electricity, heat, air conditioning, and janitor service. *Id.* The court thus held window washing was a customary and essential part of the building owner's business. *Id.* The *Wooten* court distinguished Viselli, finding that in contrast to the building owner's responsibility to its tenants to provide window cleaning, it was not an integral part of Youthcraft's business to furnish janitorial service. *Wooten*, 312 S.W.2d at 3.

We look to the particular facts of the case before us to determine whether there was substantial evidence from which the jury could reasonably conclude that the activity performed by decedent was outside the scope of National's usual business. Unless there is no room for a reasonable difference in judgment, the question of "usual business" is one for the jury. *Dunn v. General Motors Corp.*, 466 S.W.2d 700, 705 (Mo. 1971).

Here, there was substantial evidence that decedent performed the specialized work of scrubbing and buffing the floor, and of stripping and waxing it. When he scrubbed and buffed the floor, he used a propane-powered buffer owned, not by National, but by BBI. National employees at the store did not

use, any were not trained to use, the buffer. Decedent did not work in conjunction with National's own employees when he scrubbed and buffed the floor; and National employees did not perform these same functions. Compare McGuire, 756 S.W.2d at 533 (temporary worker hired as "sorter" was a statutory employee where other "sorters" worked at the plant and performed the identical task of sweeping the floor as one of their duties). Decedent worked during the night when the store was closed to the public, so that his work would not interfere with the day-to-day operation of the store. *See Wooten*, 312 S.W.2d at 3. He did not perform routine, general cleaning, the type of cleaning performed by National employees during the day. His job specifically included scrubbing and buffing the floor, utilizing a@particular program of floor care with several defined steps. It is inconclusive that at the time he was killed he may have been merely sweeping the floor, because that was a requisite step in the PEP program of floor care.

In addition, there was evidence that decedent was stripping the floor at the store on the night of his death. The process of stripping required special chemicals and utilized the machinery in a particular fashion. Stripping was done only periodically. Stripping was therefore a specialized job, not routinely performed by National's in-house employees.

From these facts and the inferences therefrom, a jury reasonably could conclude that the nature of decedent's duties did not warrant his characterization as a statutory employee. The trial court improperly granted judgment n.o.v. in favor of National. Plaintiffs' point on appeal is granted.

National raises several claims of error relative to the trial court's failure to grant its motion for new trial. *See* Rule 72.01(b). Its post-trial motion requested judgment notwithstanding the verdict or, in the alternative, a new trial.

National first charges error in the trial court's submission of plaintiffs' verdict directing instruction to the jury over its

objection. Plaintiffs' verdict director was patterned on MAI 22.02 [1991 Revision) and read as follows:

INSTRUCTION NO. 7

Your verdict must be for plaintiffs if you believe:

First, there was a danger that a worker would be attacked in the defendant's supermarket, and as a result, the supermarket was not reasonably safe, and

Second, Defendant knew or by using ordinary care should have known of this condition, and

Third, Defendant failed to use ordinary care to make the supermarket reasonably safe, and

Fourth, such failure directly caused or directly contributed co cause the death of Kenneth Bass.

National initially contends that the word "danger" in the instruction should be defined, because it is technical and susceptible to various interpretations. A trial court must define for the jury legal or technical terms occurring in the instructions. *Kline v. Bourbon Woods, Inc.*, 684 S.W.2d 938, 940 (Mo. App. 1985).

MAI does not require a definition of "danger." To provide such a definition would constitute a deviation from the approved instructions. In addition, National voiced an objection to the instruction at the conference, but did not request or offer a more specific instruction. Having failed to do so, it cannot now complain on appeal. *See Kline*, 684 S.W.2d at 941.

National also challenges plaintiffs, modification of the verdict directing instruction pursuant to MAI 19-01 [1986 Revision] for multiple causes of damage. Plaintiffs employed the first alternate of MAI 19-01 in drafting Paragraph 4 of their

verdict director, because plaintiffs considered the company which provided security to the store and the robbers who killed decedent to be other tortfeasors.

The Notes on Use (1995 Revision) state that "[t]hese modifications may be used whether or not another causing damage is a party." The Committee Comment (1995 New) states that the modification reflects the principles that a defendant is liable, although his negligence was not the sole negligence or the sole proximate cause, and although his negligence, without such other independent, intervening cause, would not have produced the injury. *See Gaines v. Property Servicing Co.*, 276 S.W.2d 169, 173-174 (Mo. 1955). In addition, it is proper to apply the MAI 19.01 modifications to a verdict director in a wrongful death action. *Honey v. Barnes Hosp.*, 708 S.W.2d 686, 693-694 (Mo. App. 1986). There was no error in plaintiffs, using the MAI 19-01 modifier on their verdict directing instruction. National's first point is denied.

National's second claim of error is that the trial court erred in admitting a photograph of decedent holding his one year old son, Christopher, who was dressed in a Santa Claus suit. National claims that the photograph was not instructive on any issue and only served to inflame the jury.

Admission of demonstrative evidence, such as photographs, is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *Biller by Summers v. Big John Tree Transplanter Mfg.* and Truck Sales, Inc., 795 S.W.2d 630, 635 (Mo. App. 1990). To be admissible, evidence must be relevant or have a tendency to prove an issue on which it is offered; and whether evidence is relevant is largely committed to the discretion of the trial court. *Id.*

In the instant action, the challenged photograph was relevant to establish plaintiff-mother's claim that as a result of decedent's death, her plaintiffs-sons, Christopher and Maurice,

were deprived of the opportunity to be raised by their father and to experience his companionship. Photographs depicting the relationship between the decedent and his son were relevant to demonstrate the impact of decedent's death upon his young child. *See Biller*, 795 S.W.2d at 635 (admission of videotape of deceased worker and son playing was relevant to show their close relationship). The trial court did not abuse its discretion in admitting the photograph. National's second point is denied.

Finally, National asserts error in the trial court's permitting plaintiffs' counsel to comment during closing argument about a "technicality in the law" regarding whether decedent was National's statutory employee. National did not object to the statements of plaintiffs' counsel at the time they were made.

Generally, failure to object to an argument or statement at the time it is made to a jury results in a waiver of any right to complain about the statement on appeal. *Glasscock v. Miller*, 720 S.W.2d 771, 777 (Mo. App. 1986). If no objection is made, the trial court does not have an opportunity to take corrective action. *Id.* Although plain error review is available under Rule 84.13(c), the plain error rule should be invoked only in circumstances which demonstrate manifest injustice or a miscarriage of justice. *Id.*

An examination of plaintiffs, entire closing argument indicates that counsel's statements did not work any manifest injustice to National. Further, it is difficult to find any prejudice to National when National's counsel himself in closing argument referred to the "legal technicality of a statutory employee/ employer relationship." National's third point is denied.

The judgment of the trial court is reversed and the cause remanded with instructions to enter judgment in favor of plaintiffs in accordance with the jury verdict.

/s/ William J. Crandall, Jr., Judge
William H . Crandall, Jr., Judge

Kathianne Knaup Crane, P.J. and Robert G. Dowd, Jr., J.:
Concurs

APPENDIX F

MISSOURI CIRCUIT COURT
TWENTY-SECOND JUDICIAL CIRCUIT
(St. Louis City)

No. 882-01425
Division No. 10

LOUISE BASS, surviving spouse of KENNETH BASS,
and MAURICE BASS and CHRISTOPHER BASS,
Surviving Children of KENNETH BASS, Deceased

Plaintiffs,

v.

NATIONAL SUPER MARKETS, INC.

Defendant.

MEMORANDUM ORDER

This cause comes on before the Court on Defendant's Motion for Judgment Notwithstanding the Verdict or, in the alternative, Motion for a New Trial. The Court, having considered the premises, arguments of counsel, and memoranda filed, hereby enters the following Order.

The Court concludes that Defendant's first ground for judgment notwithstanding the verdict is dispositive. § 287.040.1 RSMO establishes three criteria which must be met for statutory employment: 1) the work must be done pursuant to a contract; 2) that the work be performed on or about the premises of the alleged statutory employer's business; and 3) that the injury occur while work is being performed in the usual course of the statutory employer's business. *See, too, McGuire v. Tenneco, Inc.*, 756

S.W.2d 532, 534 (Mo.banc 1988); and *McDonald v. Bi-State Development Agency*, 786 S.W.2d 201 (Mo.App.E.D. 1990). It is the third element at issue, and the Court will limit its analysis to that element.

Defendant was required, by federal, state and local authorities, to maintain the cleanliness of its stores. As was the situation in *Shaver v. First Union Realty Management, Inc.*, 713 S.W.2d 297 (Mo.App.S.D. 1986), the Court finds and concludes that the tasks which Mr. Bass performed would have been done by Defendant Is own employees if not. done by Mr. Bass (or someone else sent by his immediate employer) . Janitorial services, such as those performed by Plaintiffs' decedent, were part of the usual business of Defendant. Therefore, the (court believes it is compelled to conclude as a matter of law, under current authority, that Mr. Bass was a statutory employee of National Super Markets.

The Court further notes that in Shaver, the court of appeals held that the appropriate vehicle for asserting the exclusivity of remedy under the Workers' Compensation Act is through a motion to dismiss for lack of subject matter jurisdiction. In addition, the court noted that such a dismissal is without prejudice, as the trial court was without jurisdiction to address the merits. *See Shaver*, 713 S.W.2d at 300. It is on this basis that the Court herein grants Defendant's motion.

The Court has fully considered all other grounds raised in Defendant's Motions. The Court finds and concludes that the other assertions of error are without merit, and further states that they are not well-taken. Both parties received an eminently fair trial. The Court specifically notes that Defendant was not limited in any way from presenting its case and theories to the jury, and the Court believes that each of those theories was fully and fairly presented to the jury for its determination. The jury considered all the circumstances, and rendered its verdict. The verdict was more than amply supported by the evidence, and but for the Court's belief that it is constrained to conclude as a matter of law

that Mr. Bass was a statutory employee and the Court therefore was without subject matter jurisdiction, the Court would not disturb the jury's findings and the verdict would be permitted to stand.

WHEREFORE the Court ORDERS, ADJUDGES and DECREES that Defendant's Motion for Judgment Notwithstanding the Verdict be and is hereby GRANTED on the basis that Plaintiff's exclusive remedy, as a statutory employee of Defendant, was through the Workers' Compensation Act, as a matter of law. The action is therefore DISMISSED WITHOUT PREJUDICE for lack of subject matter jurisdiction. Defendant's motion is hereby DENIED on all other grounds, as they are without merit.

The Court has considered all grounds alleged in Defendant's Motion for New Trial. That motion is hereby DENIED in all respects.

SO ORDERED:

/s/ Timothy J. Wilson
TIMOTHY J. WILSON, Judge

Dated: November 24, 1993

cc: Counsel of Record